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Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 516

EUNICE E. EASTMAN,
Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING.

MEYER ABRAMS,
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Counsel for Petitioner.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Eunice E. Eastman, by her counsel hereby petitions for the allowance of a rehearing from the order denying the issuance of the writ of *certiorari* and as reason for application says:

Since the denial of the petition there were published two opinions bearing on the issue involved. The attention of petitioner's counsel was also called to an additional authority which is squarely in point.

Petitioner's counsel was also informed by the attorneys for the respondents that they intend to apply for a summary judgment in the second case which is now pending in the same District Court and which appears in the appendix of this record at page 168. They intend to urge that the decision in the instant case on the point that there was no trust relationship between the Guaranty Trust Company of New York and the note holders constitutes *res adjudicata* as to the second suit on behalf of the owners of $1,213,000 in notes who did not receive anything out of the segregated and assigned securities. Such a motion might prevail. While in the ordinary case the denial of *certiorari* does not constitute an affirmance, yet in the instant case, where the appeal would go to the same Circuit, the denial of the *certiorari* would in effect constitute an affirmance.

The Trust Relationship. On the question whether the trust indenture created a trust relationship, which was discussed in the petition (pp. 20-21) and in the Reply (pp. 2-4) petitioner's attention was called to a statement by Professor Scott in Vol. 1, Sec. 82, p. 450, which is as follows:

> "A legal claim or **a chose in action,** even if it is not represented by a specialty or other instrument as in case of bonds or shares of stock, can be held in trust. **Thus a creditor can create a trust of his claim against the debtor by transferring it to another as trustee.**"

The illustration of Professor Scott applies on all fours to the instant case, as the note holders, as creditors, transferred their rights of action to the Guaranty Trust Company in trust to enforce such rights and to enforce the covenants contained in the agreement with reference to the "segregated assets" and "assigned securities".

We stated in the petition that even if there were no trust *res* there was a *trust relationship* between the Guaranty Trust Company and the petitioner. This was held in *State* v. *Saratorin,* 130 S. W. 2nd 547 (Mo. 1939). There the court pointed out that "in the strict sense" a trustee is one who holds the legal title to property for the benefit of another, while in the "broad sense" the term is applied to *anyone standing in a fiduciary capacity,* and as authority for the statement it cited a decision of the court (110 U. S. 330).

Whether in the "strict sense" or in the "broad sense" *there was a trust relationship* established by the Guaranty Trust Company when it caused the $30,000,000 note issue to be floated on the market and when it *accepted the terms* of the trust "created" thereby (R. 104).

In connection with the petition for rehearing we ask the Court to examine the complaint (R. 168) filed on behalf of the owners of $1,230,000 in notes who did not receive anything out of the assigned securities and segregated assets by reason of the acts of the trustee and to *consider the effect of the decision and the denial of the certiorari* on the proposed motion of the respondents in the latter case to defeat the action by a defense of *res adjudicata.*

We also would like to refer this Court to the statement in Bogert on Trusts, Sec. 111, p. 349, as follows:

> "The property *interests* which the trustee holds are called the trust property, *trust res* or the subject matter of the trust."

It should be noted that it is not the "property," but the "interests" that *is the subject matter of the trust or res.* In the instant case the interests of the note holders in the property was *their right of action* and such interests were exclusively vested in the trustee. Therefore, there was a trust *res.*

The Two Decisions Published Subsequent to the Denial of the Petition.

Petitioner asked in her petition the following question (p. 20):

> "What was this Trust Indenture upon which the $30,000,000 in notes were floated on the market by the Trustee and by its Subsidiary whereby over $15,000,000 were lost to the investors?"

Even if the answer be that it was not a Trust, it was at least a contract establishing an agency, and thereby a fiduciary relationship was also established as held in a decision published December 23, 1942, subsequent to the denial of the petition (*Doner* v. *Phoenix Land Bank,* 381 Ill. 106). There, the Court said, p. 113:

> "The rule is that the relation of principal and agent is a fiduciary one. (*Quinn* v. *Phipps,* 113 So. (Fla.) 419, 54 A. L. R. 1173; *Dennis* v. *McCagg,* 32 Ill. 429.) The allegations in the complaint show an unequivocal act of agency by Westervelt. Whether he volunteers or agreed in response to appellant's efforts to save his property is immaterial. By assuming to act for appellant he took upon himself certain obligations, among which was the duty not to deal with the subject matter of the agency for his own advantage."

The Court also said:

> "The legal effect of the transaction for his own benefit was the creation of a constructive trust. The rule in this State is established by an unbroken line of decisions that anyone occupying a fiduciary rela-

> tion, such as an agent, trustee, partner, guardian, conservator, attorney, executor or administrator, cannot deal on his own account with any thing or the persons falling within that trust relationship. (*Dennis* v. *McCagg, supra; Suchy* v. *Hajicek,* 364 Ill. 502; *Pulfrey* v. *Wid,* 340 *id.* 553; *Pope* v. *Dapray,* 176 *id.* 478; *Kochorimbus* v. *Maggos,* 323 *id.* 510.) If anyone occupying such a relation deals with the subject matter of the relationship and thereby gains an advantage to himself he will be deemed guilty of fraud, either actual or constructive, depending upon his intent and purpose."

Whether or not there was a trust or an agency established there was in either case a confidential relationship which would entitle the petitioner to relief.

In the *Doner* case, *supra,* the Court also said at page 114:

> "Where it appears, as in this case, that the relation of trust and confidence existed by reason of the agency, the agent who has profited thereby has the burden of rebutting the presumption of fraud by clear and convincing proof that he has not betrayed the confidence reposed in him. (*Suchy* v. *Hajicek, supra; Pulfrey* v. *Wid, supra.*) Where one occupying such a relation to another, through any questionable means, gains something for himself, which in equity and good conscience he should not be permitted to keep, equity will raise a constructive trust and compel him to turn it over to the one equitably entitled to it, or to otherwise execute the trust as the court may direct."

The other case which was published subsequent to the filing of the petition is the decision in *Toebelsman* v. *Missouri-Kansas Pipe Line,* 130 F. (2d) 1016. In that case the Court construed Rule 56 and held that on a motion for a summary judgment the Court is in no position to pass

on any *factual* matter and on the question whether there was a factual matter to be decided the doubt must be resolved *against* the *movant*. This point is of importance on the question whether or not the trial court or the court of appeals had a right to decide the *factual* question whether the open account of $27,154,584 was of "doubtful" or "substantial" value.

This petition for rehearing presents the question whether one class of note holders who were defrauded of half of their debt by the trustee of the note issue may recover anything from the trustee for a breach of trust and whether another class of note holders who lost *their entire investment* as a result of breach of the trust by the trustee, which actively participated in the misapplication of the segregated assets and assigned securities may have no remedy because of the conclusion that the trust agreement did not constitute a trust. We hope that this Court will re-examine our petition and reply in the light of the new authorities cited above and particularly the effect of the denial of the application on the pending suit (R. 168) and that it will vacate the denial and allow the issuance of the writ.

Respectfully submitted,

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Counsel for Petitioner.

SHULMAN, SHULMAN AND ABRAMS,
134 North La Salle Street,
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Certificate of Counsel.

The undersigned, Meyer Abrams, one of the attorneys for the petitioner, hereby certifies that he prepared the foregoing petition for rehearing, and that he is of the opinion that the petition is well founded in point of law, and is not interposed for the purpose of delay.

Chicago, January 5, 1943.

MEYER ABRAMS,
Counsel for Petitioner.